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LEGAL MONOPOLY.[1]

INDUSTRIAL monopoly rests on law. Experience does not show that any one man has the wealth, ability and daring to obtain individual ownership of all the coal mines, iron mills or oil refineries in the United States. Monopoly in production can thus be obtained and maintained only under laws that protect combinations of natural persons for that object.

Promoters of industrial monopolies well know the source of their powers. Within the last quarter of a century combinations to control production and prices of staple commodities have taken in succession four distinct forms: the pool, the trust agreement, the stockholding corporation, and the corporation owning a majority of all the manufacturing plants of a particular kind. As the courts have in turn refused legal support to each of the first three forms of combination, their promoters have adopted the succeeding form. The present form of combination, the corporation with a monopoly in manufacturing plants and therefore in their products, is quite as much the creature and creation of the law as were any that have preceded it. Repeal charters that authorize corporations to own or operate plants of the same sort in more than one state, and industrial trusts will disappear. Revoke licenses that permit foreign corporations to monopolize factories in every state, and production will again be regulated by competition. Industrial monopoly in its present form is thus dependent not only on the laws of states that grant roving commis-

sions in corporate charters, but also on the laws of all the states into which the foreign corporation goes to acquire factories. The extent to which legal support is thus granted to industrial trusts is shown by the fact that in the year 1900, 185 corporations owned 2,216 manufacturing plants scattered over forty-two states and territories.[1]

Monopoly effected by means of a corporation is defended on the assumption that the combination of any number of persons and factories under a corporate charter is legal, though the combination of the same persons and factories in any other way, for the same purpose of monopoly, would be illegal. According to this view the vice of monopoly is not due to its effects on production and prices, but simply to the way in which it is accomplished.

A few decisions of courts rendered during the last decade give some support to monopoly in a single corporation. A case of this sort was Oakdale Company *v.* Garst,[2] decided in 1894, where an injunction was sought to restrain Garst from violating a contract that he had made not to engage in the manufacture of oleomargarine during a period of five years. It appeared in this case that the Oakdale Company had purchased the business of three out of the four companies in New England that were engaged in this line of manufacture. The business of Garst was one of those purchased by the new corporation, but he claimed that his contract was void because of the tendency of the combination to create a monopoly. The court granted the injunction against Garst, but put it distinctly on the ground that there was neither monopoly nor an approach to it by the combination in question, because another strong, independent company remained in New England and there were companies in other parts of the country that might compete in the same field.

Perhaps the strongest case supporting the legal right of a corporation to create a virtual monopoly, by the purchase of a majority of the factories in a particular line, is that of Trenton Potteries Company *v.* Oliphant,[3] decided by the court of New Jersey in 1899. It appeared in this case that, in 1892, there were nine concerns in the United States engaged in the manufacture of san-

[1] U. S. Census, vol. vii, p. lxxv. [2] 18 R. I. 484. [3] 58 N. J. Equity, 507.

itary pottery ware, and seven of these were located in Trenton, New Jersey. In order to control the prices of this class of pottery, the Trenton Potteries Company was formed under a New Jersey charter and purchased five of the pottery plants in Trenton. Each seller of a pottery plant agreed not to engage in the manufacture of pottery ware in any part of the United States, except Nevada and Arizona, during a period of fifty years. Oliphant was the owner of one of the plants sold to the Trenton Company, and sometime thereafter he again engaged in the manufacture of sanitary ware contrary to his contract. Suit was then brought asking for an injunction against this manufacture as carried on by Oliphant and others. The lower court held that the partial monopoly established by the Trenton Potteries Company was against public policy, and dismissed the suit.[1] On appeal to the highest state court, the decision of the lower court was reversed, and an injunction was granted as to manufacture in New Jersey, but not as to other parts of the territory covered by the contract, because it was not proved that the business sold by Oliphant extended into other states. The court justified the aid thus given to the combination represented by the corporation on the ground that the purchase of competing plants was authorized by its charter, and that the public policy of the state had thus been fixed by the legislature. On this point the language of the opinion was: "The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard."

In a number of other cases state courts have supported minor combinations of manufacturing plants in the hands of a single corporation. It is believed, however, that no court of last resort has held that a corporation may legally establish a complete or virtual monopoly in a particular line by the purchase of most or all of the manufacturing plants of a particular sort in the United States.

The strongest case in the federal courts supporting industrial monopoly in the ownership of factories seems to be that of Metcalf *v.* American School Furniture Company,[2] decided in 1903,

[1] 56 N. J. Equity, 680.

[2] 122 Fed. Rep. 115

where a minority stockholder sought to have the sale of the plant of his company set aside. It appeared that the American Company was formed to acquire the plants of other concerns engaged in the manufacture of school furniture, and thus to create some degree of monopoly in that business. A part of the defence in the case was that the transfer of the plant in question was entirely collateral to any intention of the American Company to create a monopoly. The court accepted this view of the transaction and refused to set aside the sale, saying in part:

> Great stress is laid upon the point that the transfer of the good will and plant of the Buffalo Company is entirely separate and independent of any intention by the directors of the American Company to create a monopoly in restraint of trade. Careful consideration of the questions here involved constrains me, though with hesitation, to accept this view of the transaction charged in the bill.

As may be seen from this quotation, the decision here went on the ground that the purchase in question was not a part of the scheme to create a monopoly; and the implication clearly was that the scheme itself was illegal.

Turning to the Supreme Court of the United States, it does not appear that there is a decision or even a dictum to the effect that a combination of natural persons in a single corporation with the intent and effect of creating a complete or virtual monopoly in the manufacture or production of a given commodity is legal. On the contrary there are repeated dicta that such a combination is illegal, like the other forms of combination that have preceded it. A case sometimes cited to support the view that the purchase of independent factories so as to give a single corporation a monopoly in production is legal, is that of United States *v.* E. C. Knight Company,[1] decided in 1895. It will be seen on examination, however, that this case leads to no such conclusion. As to the facts of this case, it is to be noted that the monopoly was created not by the direct purchase of the four Philadelphia sugar refineries by the American Sugar Refining Company, but by the purchase of the stocks of the several corporations owning these

[1] 156 U. S. 1.

refineries. This form of combination, that is the holding by one corporation of the stocks of other corporations to control production or prices, like the pool and the trust agreement, has generally been held illegal by both state and federal courts. In this case the illegality of the combination was of no moment because its acts did not fall within the prohibition of the statute[1] under which the suit was brought, according to the construction given that statute by a majority of the court. On this point the court said:

> The fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the Act of Congress in the mode attempted by this bill. . . . Congress did not attempt thereby to assert the power to deal with monopoly directly as such.

On these grounds the court dismissed the bill that had been brought to set aside the sale of stocks of the E. C. Knight and other corporations to the American Sugar Refining Company.

Another case that is sometimes supposed to give the color of legality to monopoly secured by a single corporation in the ownership of factories is Dickerman *v.* Trust Company,[2] decided in 1900. Suit in this case was brought to foreclose a mortgage given by the Columbia Straw Paper Company on some forty mills that it had purchased. The bonds secured by this mortgage were not paid when due, and tne trust company holding the mortgage brought suit, which was defended on the ground that the corporation was an unlawful combination. The court rejected this defense and said in part:

> If this were a proceeding in *quo warranto* to attack the organization of the corporation . . . or an action against a member of the combination to enforce any of the provisions of the original contract, the validity of such a contract would become a material inquiry. But in a suit to foreclose a mortgage upon the property of the concern it is difficult to see how the purpose for which the corporation was originally organized can become a material inquiry. . . . It would seem a curious defense if a mortgagor could set up against the mortgage that the property cov-

[1] 26 Statutes at Large, 209. [2] 176 U. S. 181.

ered by it was used for an illegal purpose unknown to the mortgagee, as, for instance, gambling, and therefore that the mortgage was invalid.

The plain implication here is that the combination represented by the corporation was illegal and would have been so held in a case where that question was involved.

Opposed to the few opinions and dicta where the legality of some degree of monopoly created by the purchase of factories by a single corporation has been upheld, a much larger number of decisions take the opposite view. Richardson *v.* Buhl,[1] decided in 1889, was an action brought to recover money that had been paid under a contract to promote the formation of the Diamond Match Company, which had been incorporated to purchase plants engaged in the manufacture of friction matches. Each person selling a match factory was required to give the Diamond Match Company a bond not to engage in the business in any way that would conflict with the interests of that company. In the course of its opinion the court denied recovery, saying:

All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts. In my judgment, not only is the enterprise in which the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy.

The important point in this case is that a combination of natural persons for the purpose of monopoly is not made legal by the use of the corporate form, and that it is illegal for a corporation to obtain a monopoly of manufactured products by the purchase of all the instruments employed in their production. It is to be noted that the Michigan court was not construing a statute in this case, but decided it on the principles of the common law. In other words, the court made it a part of the common law of Michigan that monopoly of the instruments of production in any line, acquired by a single corporation through the purchase of

[1] 77 Michigan, 632.

these instruments, is illegal. To reach this conclusion the court evidently went on the principle announced by it in the case of Wooden Ware Association *v.* Starkey,[1] decided in 1890, where an injunction to enforce a contract in restraint of trade was refused, and it was said:

It is the duty of the court to see that the public interests are not in any manner jeopardized. The state has the welfare of all its citizens in keeping, and the public interest is the pole-star to all judicial inquiries.

In Distilling and Cattle Feeding Company *v.* The People,[2] the Illinois court considered the legality of the purchase by that company of a large number of distillery plants to establish a virtual monopoly in the business. The action was *quo warranto*, brought by the attorney-general to annul the corporate charter of the domestic corporation under the Illinois anti-trust law.[3] In its judgment of ouster against the corporation the court said:

There can be no doubt, we think, that the Distillers' and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was therefore illegal. . . .

But the defendant contends that, while this may all be so, the change in organization from an unincorporated association to a corporation, and the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations, by means of which the control of those properties was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, have purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as the holders of all the capital stock of the corporations and as a majority of the directors of each, controlled such corporate property, became the subscribers for all the stock of the new corporation, and its board of directors. The

[1] 84 Michigan, 76. [2] 156 Illinois, 448. [3] Laws of 1893, p. 182.

conveyance and transfer of the properties of the constituent companies to the new corporation was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies, as before. The trust, then, being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country — over production and prices — and the virtual monopoly formerly held by the trust are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons.

In this case the defendant, a domestic corporation, lost its charter because its stockholders, in its formation and management, had combined to create a monopoly. The Illinois statute provided:

That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them, for either any or all of the following purposes.[1] . . .

In no part of the act was it provided that a single corporation or a combination of its stockholders acting in its name should be regarded as a trust. So far as the statute was concerned, the court might have acted on the fiction that a corporation is a single person, and so might have held that no combination existed. But the court refused to close its eyes to the patent fact that a combination does not cease to be such because the persons composing it have been granted some special privileges by a legislature. The court looked through the fictitious legal person and saw the real

[1] Laws of 1893, p. 182.

persons that gave it thought, life and action, and who expected to profit by the monopoly they had created.

In the foregoing case a domestic corporation lost its charter. In Harding *v.* American Glucose Company,[1] decided in 1899, the Illinois court had to pass on a similar state of facts as to a foreign corporation. A New Jersey corporation in this case had been formed to purchase the manufacturing plants of the American Glucose Company, another New Jersey corporation owning a factory in Illinois, and of five other corporations. Each of the selling corporations and its officers were bound by agreement with the new corporation not to engage in the manufacture of glucose within one thousand miles of Chicago. Harding, a stockholder of the American Glucose Company, brought an action to have the transfer of the plant of this corporation to the new corporation annulled. The court set aside the deed by which the property had been conveyed, saying:

It makes no difference whether the combination is effected through the instrumentality of trustees and trust certificates, or whether it is effected by creating a new corporation, and conveying to it all the property of the competing corporations. . . . Citizens of Illinois cannot evade the laws of Illinois passed against trusts and combines and defy the public policy of the state, by going into a foreign state, and chartering a corporation to do business in this state in violation of its laws.

The decision of this case was based in part on the Illinois statutes[2] against trusts; but, as in Distilling and Cattle Feeding Company *v.* The People,[3] the court seems to have exercised common-law powers, and gone beyond the mere wording of the statutes, by holding that a corporation formed for the purpose of monopoly is an illegal combination. A similar result was reached by the Missouri court in the case of National Lead Company *v.* Grote Paint Store Company,[4] decided in 1899. In 1891 the National Lead Trust held the stocks of a number of corporations that manufactured the greater part of the entire output of white lead in the United States. Even at that date it was clear enough that

[1] 182 Illinois, 551.
[2] Statutes of 1891, p. 206; 1893, p. 182.
[3] 156 Illinois, 448.
[4] 80 Missouri App. Rep. 247.

monopoly based on the deposit of corporate stocks with trustees was illegal, and persons interested in the lead trust therefore obtained a corporate charter for the National Lead Company in New Jersey. This corporation purchased the manufacturing plants of the various companies that were interested in the trust, and thus secured a large degree of monopoly in the supply of white lead. The National Lead Company had a St. Louis branch, and sold white lead there to the defendant in this case. Suit was brought to obtain payment for this lead, and it was pleaded in defense that the National Lead Company was an illegal combination, and that therefore the defendant was not liable for the price of the lead, under the Missouri trust act[1] of 1891. This act provided that any combination between persons, partnerships or corporations to regulate or fix the price of any commodity should be deemed a conspiracy, and that the persons or corporations engaged therein should be subject to certain penalties, among which was the inability to recover the price of goods sold. Nowhere in the act was it stated that a single corporation which secured a monopoly should be deemed guilty of such conspiracy. In holding that the corporation could not recover for the goods sold, the court said, in part:

> Hence it must follow that if the stockholders and governing officers of the plaintiff corporation combined with each other to violate any of the provisions of the section under review through the instrumentality of their corporate entity, then the corporation composed by them was a party to such illegal combination within both the letter and the spirit of the above section of the act of 1891. Or, concretely stated, that a combination which is illegal under the anti-trust law, cannot be operated under the cloak of a corporation by its constituent members or governing bodies.

From the foregoing cases it appears that the courts of three states, Michigan, Illinois and Missouri, have reached the conclusion that the organization and management of a corporation to secure a monopoly in the ownership of manufacturing plants of any sort is an illegal combination of the stockholders of that corporation.

[1] Laws of 1891, p. 186.

Similar results have been reached in the federal courts. The National Harrow Company was formed to manufacture harrows and, apparently, to control that line of business. This company purchased some eighty-five patents on harrows from a number of concerns engaged in their manufacture, paying therefor largely by issues of capital stock. Each manufacturer of harrows was then licensed to continue his business as before, except that a royalty of one dollar was to be paid to the National Harrow Company on each harrow sold, and each manufacturer was bound to make only the style of harrow covered by his license and to sell at prices fixed by the National Harrow Company. One Quick infringed a patent thus secured by the National Harrow Company, and that company brought its bill in the federal court for an injunction against him. In its opinion refusing the injunction the court said:

It seems to me that such a combination is illegal. . . . It seems to me that the court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant.

This case, National Harrow Company *v.* Quick,[1] decided in 1895, came up in the Indiana district of the federal court. In the following year the United States circuit court decided the case of National Harrow Company *v.* Hench,[2] which came up from a Pennsylvania district. In this case Hench, one of the licensed manufacturers of harrows, had broken his contract with the National Harrow Company by selling harrows at prices below those fixed by that company. Thereupon the National Harrow Company brought its bill in equity asking for damages and an injunction to prevent further violation of the license contract by Hench. In the course of its opinion denying the prayer of the bill the court said:

Now, it is quite evident to me, as well by the papers themselves, as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring-tooth harrows, and controlling the manufacture thereof throughout the entire

[1] 67 Fed. Rep. 130. [2] 76 Fed. Rep. 667.

country, and that the combination, especially by force of the numbers engaged therein, tends to stifle all competition in an important branch of business. I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained.

In both of the cases just considered the federal courts seem to have gone on the ground that the purchase by the single corporation of eighty-five patents covering nearly all the styles of harrows in use, with the evident intention to secure a monopoly and control manufacture and prices, was itself illegal. Other attempts of single corporations to monopolize the manufacture of particular products have been regarded in the same light. Before 1891 the American Biscuit and Manufacturing Company had purchased thirty-five bakeries located in twelve states. One of these bakeries was sold to the Biscuit Company by Klotz, who was thereupon employed by the company as its agent to operate the bakery plant and its business. Klotz subsequently determined to rescind the sale he had made, began to operate the bakery in his own name, and tendered back to the Biscuit Company the shares of their capital stock which had been given to him in payment for the plant. On this state of facts the Biscuit Company brought an equity suit in the Federal court to prevent further operation of the baking plant by Klotz. This suit was decided by the circuit court for a Louisiana district in American Biscuit and Manufacturing Company *v.* Klotz,[1] in 1901. A Louisiana statute[2] had declared any combination to monopolize commodities illegal. Referring to this statute and to the federal Anti-Trust Act the court said in part, while refusing to interfere with Klotz in his possession of the bakery:

The statutes show that the evil was the hindrance and oppression in trade and commerce wrought by its absorption in the hands of a few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition would be swallowed up, so that the man of small means would find himself excluded from the restrained or monopolized trade or commerce as absolutely as if kept out by law or force. If this is the meaning of the defining words, does not this

[1] 44 Fed. Rep. 721. [2] Statute of July 5, 1890.

corporation, thus glutted with the thirty-five industries of twelve states, disclose an "attempt to monopolize"? So far, therefore, as the complainant's business is a combination in restraint of trade, or is an attempt to monopolize or combine, in the form of a trust, or otherwise, any part of trade or commerce, as these words are properly defined, the law stamps it as unlawful, and the courts should not encourage it.

Another case which involved similar facts, and in which a like result was reached, came before the United States court of appeals from a Michigan district, *viz.*, McCutcheon *v.* Merz Capsule Company,[1] decided in 1896. A New Jersey corporation, the United States Capsule Company, was organized in 1893 to purchase the plants and business of four concerns engaged in the manufacture of gelatine capsules. The Merz Capsule Company was one of these concerns. It executed a deed of its plant to the United States Capsule Company on December 21, 1893, and took back on that date a lease of the same plant in order to work up stock not included in the sale. In payment for its plant the Merz Capsule Company was to receive stock and bonds of the new corporation, the bonds being secured by a mortgage on all its property. Before the above named lease expired, the Merz Company determined to rescind the sale of its property to the United States Capsule Company, and accordingly tendered back the capital stock that had been received in part payment for the plant, and gave notice that it would not carry out the agreement. On this state of facts the United States Capsule Company endeavored to get possession of the plant of the Merz Capsule Company by force, and the latter company brought its bill in equity, asking that the agreements and conveyances entered into as to its plant and business be cancelled, and that the United States Capsule Company be enjoined from interfering with the property in question. The decree of the court affirmed the illegality of the agreement and deed mentioned, and restrained the United States Capsule Company from asserting any title or right to possession under them, saying in part:

Under all these circumstances, to hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it

[1] 37 U. S. Appeals, 586.

was a party would be to effectuate an unexecuted, unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality.

In this case the federal court seems to have enforced the common law as laid down in Richardson *v.* Buhl,[1] above noted, that the purchase by a single corporation of a number of manufacturing plants, so as to obtain a large degree of monopoly in their products, is illegal.

The question whether a single corporation may legally establish a monopoly by the purchase of most or all of the manufacturing plants of a particular sort throughout the several states has, it seems, never been squarely presented to and decided by the Supreme Court of the United States. Several cases, however, seem to indicate the views of the court as to such a monopoly. One of these cases is Central Transportation Company *v.* Pullman Palace Car Company,[2] decided in 1891 by a unanimous opinion, save that Justice Brown did not sit. This case came up from the United States circuit court for a Pennsylvania district, which obtained jurisdiction because of the diverse citizenship of the parties. The action was brought to recover rent under a lease, by which the Transportation Company, a Pennsylvania corporation, transferred all of its cars, patent rights and contracts to the Pullman Company, an Illinois corporation, for a term of ninety-nine years from February 17, 1870, at an annual rental of $264,000, and by which it also agreed not to make or hire sleeping cars. The Transportation Company had no power of eminent domain, owned no railway, and enjoyed no public or special franchise save the franchise to be a corporation. Suit was brought against the Pullman Company because it refused to continue the payment of rent under the lease, and the defense was in part that the contract was against public policy. In the course of its opinion denying recovery the Supreme Court said:

[1] 77 Michigan, 632.

[2] 139 U. S. 24.

There is strong ground, also, for holding that the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy. . . . This case strikingly illustrates several of the obvious considerations for holding contracts in restraint of trade to be unreasonable and void, as compactly and forcibly stated by Mr. Justice Morton in the leading case of Alger *v.* Thacher. [1] They tend to deprive the public of the services of men in the employments and capacities in which they are most useful to the community as well as to themselves. They prevent competition and enhance prices. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market.

Since the Supreme Court held the lease in this case unlawful because of its tendency to monopoly, there is some ground to think that the outright purchase of all the manufacturing plants of a given sort in the several states, by a single corporation, might be held illegal for the same reason. Dicta in the case of United States *v.* E. C. Knight Company [2] support this view, for the court there said:

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.

As has been already pointed out, this case merely decided that Congress had not authorized the court to deal with monopoly in the manufacture of commodities. In the course of his notable dissenting opinion in the Knight case, Justice Harlan said:

Suppose that a suit were brought in one of the courts of the United States — jurisdiction being based, it may be, alone upon the diverse citizenship of the parties — to enforce the stipulations of a written agreement, which had for its object to acquire the possession of all the sugar refineries in the United States, in order that those engaged in the

[1] 19 Pickering, 51, 54. [2] 156 U. S. 1.

combination might obtain the entire control of the business of refining and selling sugar throughout the country, and thereby to increase or diminish prices as the particular interests of the combination might require. I take it that the court, upon recognized principles of law common to the jurisprudence of this country and of Great Britain, would deny the relief asked and dismiss the suit upon the ground that the necessary tendency of such an agreement and combination was to restrain, not simply trade that was completely internal to the state in which the parties resided, but trade and commerce among all the states, and was, therefore, against public policy and illegal.

This quotation makes it sufficiently clear that, in the mind of Justice Harlan, the purchase of most or all of the manufacturing plants of a given sort in the United States, in order to control the prices of their products, by a single corporation would be illegal on common-law principles.

The American people, as represented by their courts, stand apparently at the parting of the ways. On the one hand is a line of judicial decisions running back through five centuries and condemning as illegal every form of combination that produces a monopoly in the necessaries of life. On the other hand is a short line of decisions, hardly two decades old, that give much support to the view that any monopoly can find legal support if the combination of natural persons that effects it is carried out with the aid of a corporate charter. The decisions on the one hand leave an open highway for free competition, on the other hand they lead to complete monopoly. Looking back at the dissenting opinion of Justice Harlan in the Knight case, his words on this point, in 1895, were almost a description of present conditions, when he said:

We have before us the case of a combination which absolutely controls, or may, at its discretion, control, the price of all refined sugar in this country. Suppose another combination, organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another, of all the grain elevators; another, of all the oil territory; another, of all the salt-producing regions; and another, of all the great establishments for slaughtering animals, and the preparation of meats. . . .

Glittering generalities about changed economic conditions will neither explain the existence of such monopolies, justify their operations, nor reveal the true source of their power. Human cupidity changes little through the ages. One Wadington who tried to corner the English hop market a century ago, and was heavily fined by Lord Kenyon for his pains, was actuated by much the same motives as those who now seek monopolies through the aid of corporate charters.

Some say, however, that monopoly in the various lines of manufacture is necessary to national prosperity. This assertion lacks both proof in the present and example in the past. England, the greatest commercial empire of the world, has reached its position through an industrial system of free competition. The factories scattered all over the United States, that are being bought up, and in many cases dismantled or closed by great foreign corporations, have been built under a competitive system during a century of the greatest industrial expansion that the world has ever seen.

Most absurd of all is the argument that the law must support monopoly because obtained by combination of natural persons under a corporate charter, though monopoly obtained in any other way is illegal. Listen to the words of Judge Finch in People *v.* North River Sugar Refining Company,[1] in the opinion by which the charter of that corporation was annulled:

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is: What, in a given case, has been that collective action and agency? As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the state, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the in-

[1] 121 N. Y. 582.

dividuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hand, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception and, so acting, reach results and accomplish purposes clearly corporate in their character and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction.

Other arguments failing, it is said that the legality of mo nopoly in the ownership of factories by single corporations must be supported because great investments have been made in them. How made, and by whom? The real investments of materials and labor in the construction of the purchased plants were made before the blighting hand of the trusts dismantled their equipments and left many a formerly competing plant idle and useless. In the organization of one of these monopolistic corporations, capital stock to an amount several times as great as the first cost of the purchased plants is issued, and then the corporation is bonded for an amount fully equal to this cost, and all the plants are mortgaged to secure these bonds and make them salable. Meantime the capital stock of the corporation, representing usually no investment whatever above the amount covered by the bonds and mortgage, has been in large part turned over to the promoters of the corporation as their profit in the enterprise. By this means a few persons hold a majority of the capital stock and control a corporation whose property has been furnished or paid for by the bondholders. The so-called investment that the law is called upon to protect is thus the assumed right of a few so-called "insiders" to manage or mismanage property for which they have never paid, and which they do not in either law or equity own. In other words, the promoters of the trust have capitalized the assumed right to burden the public with monopoly prices, and now claim a vested interest in the destruction of competition.

Take the strongest possible case in favor of the legality of the

trust, where some innocent purchaser has paid value for stock in a corporation whose entire assets will hardly satisfy its bonded debt. Is the public in this case to be permanently burdened with monopoly prices because some ill-advised person has been swindled by the purchase of stock from a promoter? But it is said, let the legislature and the courts see to it that no more than a reasonable price is charged for the commodity produced by the monopolized plants. Assuming that this can be done, how is the holder of stock that represents no actual investment to be benefited? In the language of Justice Harlan, when defining the rights of a public service company: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." [1] This "fair return" will, perhaps, pay the interest on the bonds of the corporation, though some of the plants which these bonds were used to purchase are idle and dismantled; but how can it yield anything for the stock that represents no investment in these plants?

In truth, however, the argument that corporate monopolies should be upheld because those interested will otherwise be injured is unsound at its very root. On what theory of jurisprudence is the law against combinations to be defeated because its enforcement will injure those who have broken it? According to this theory the pool, the trust agreement and the stockholding corporation should all have been supported by the courts, lest some person who had thus broken the law should suffer. But on this point the courts have thought otherwise.

As has been shown above, the main support for the legality of monopolistic combinations under corporate charters is found in an opinion of doubtful authority by the New Jersey court. In this case the court put its decision distinctly on the ground that the domestic corporation involved was authorized by the New Jersey legislature to do what had been done under its charter, and that the New Jersey court was bound by the legislative will. Moreover, the court in this case denied that any monopoly, virtual or complete, had been created. This goes far to reduce the language of this court as to the legality of such monopolies

[1] 169 U. S. 466.

to mere dicta. Obviously the courts of other states are not bound to respect the powers conferred on foreign corporations by the states which have created them. Neither are the decisions of a court under a local statute of any necessary weight in other states where no such statute exists. If New Jersey likes monopoly, let the legislature and courts there foster it within their jurisdiction, but other states are under no obligation to bow to its legislative and judicial decrees.

Questions involving the legality of corporate combinations for monopoly purposes are pressing upon the courts in many states. The choice between competition and monopoly in industrial affairs must soon be definitely and perhaps definitively made. No doubt can be entertained as to the desire of the great mass of the people that competition be maintained. If monopoly is permanently established, an effort will be made to escape its prices, either along the rough road of profit regulation, or by excursions into the fields of public ownership.

It is hardly to be assumed that the law of five centuries against monopolistic combinations of all sorts is to be overturned by a decade of corporate license. If legislators truly represent their constituents, the licenses of corporations to monopolize forests, mines and factories will be withdrawn. Unless judges forsake the wholesome principles of the common law, monopolistic combinations of natural persons under corporate charters will not be upheld. If, however, corporate monopoly does ultimately triumph over competition, its power will not be due to improved processes of manufacture, to the supposed economies of the concentrated management of scattered factories, nor even to the advantages of production on a great scale. On the contrary, its power will be derived from roving charters to purchase competing plants, granted by the legislatures ot some states and sanctioned by the courts of all the others. This triumph of monopoly can come only after private greed has darkened the ancient lights of the common law.

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